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NO. 80-686

IN THE
SUPREME COURT OF THE UNITED STATES

CRAIG R. MORRISON, Petitioner

VS.

COMMONWEALTH OF PENNSYLVANIA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION
TO
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW:

Whether the 4th Amendment of the United States Constitution requires that evidence seized pursuant to a search warrant be suppressed where the affidavit for search warrant is based in part on personal observations of an undercover state trooper who, after receiving information from a confidential informant that the defendant was dealing marijuana from his barn, represented to the defendant that he wished to view the interior of the barn because he had recently acquired a barn which he wanted to remodel and the defendant, based on this representation, opened a shutter of the barn and permitted the trooper to look inside the barn at which time the trooper observed the marijuana?

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NO. 80-686

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CRAIG R. MORRISON, Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA, Respondent

BRIEF IN OPPOSITION
TO
PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS AND JUDGMENTS BELOW:

The majority and concurring Opinions of the Superior Court of Pennsylvania filed March 21, 1980 can be found at ____Pa. S. ____, 418 A.2d 1378 (1980) and are printed in the Petition-

er's Appendix at A-2 and A-11, respectively.

The Opinion of the Court of Common Pleas of Chester County is not reported; however, it is printed in Petitioner's Appendix at A-21.

The Order of the Supreme Court of Pennsylvania denying Petitioner's request for allowance of appeal is not reported; however, it is printed in Petitioner's Appendix at A-1.

JURISDICTION AND CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

Respondent adopts, for purposes of this brief, the text of the Petitioner's

Petition for a Writ of Certiorari under the headings of Jurisdiction and Constitutional Provisions Involved, except to note that jurisdiction should be invoked under 28 U.S.C. §1257(3), and not as Petitioner states at 27 E.S.C. 1257(3).

Also, Petitioner styles his document as a "Writ...to the Supreme Court of Pennsylvania". Since the Supreme Court of Pennsylvania denied review in this case, the Writ, were it granted, should be directed to the Superior Court of Pennsylvania.

STATEMENT OF THE CASE:

Respondent adopts, for purposes of this brief, Petitioner's recitation of this case's procedural history in the state courts (para. 1, p.3, Petition for Writ of Certiorari).

During the first week of October 1977, Trooper Clifford Shaw, a narcotics investigator with the Pennsylvania State Police, went to the residence of Petitioner in West Goshen Township, Chester County. Petitioner was not at home, and Trooper Shaw spoke with his sister. The trooper stated to Petitioner's sister that he had heard that Petitioner was in the process of converting a barn located on the premises into a home, and misrepresented that he was contemplating a

similar conversion of a barn that he owned. He requested permission to examine the structure to get an idea how the work should be performed. The trooper was in plain clothes and at no time did he identify himself as a member of the Pennsylvania State Police. Permission was granted, and Trooper Shaw examined the outside of the barn, although he did not venture inside. No incriminating evidence was obtained. The trooper did not explain why he was investigating Petitioner during the first week in October 1977.

As early as October 15, 1976, and again on October 17, 1977, Trooper Shaw received information from two sources indicating that Petitioner was storing large quantities of drugs in the barn in West Goshen Township. On November 1,

1977, Trooper Shaw returned to Petitioner's residence. This time Petitioner was present and working outside the barn. Trooper Shaw, again in plain clothes, gave a false name and misrepresented to Petitioner that he had purchased a barn and was interested in converting it into a photography studio, but that he lacked the technical expertise to carry out the planned conversion. Petitioner showed the trooper various items of craftwork on the outside of the barn. Trooper Shaw then requested permission to enter and inspect the interior. Petitioner refused, explaining that the interior was rather dirty, and that he wanted to delay any inspection until it could be cleaned. Without any further request by the trooper, Petitioner then approached a large shuttered window, pulled open the shutters and invited Trooper Shaw to inspect the

interior. Making a visual inspection through the window, Trooper Shaw observed a quantity of marijuana.

Later that same day, Trooper Shaw secured a search warrant. On November 2, 1977, the warrant was executed and approximately eighty pounds of marijuana recovered from Petitioner's barn. On February 29, 1978, Petitioner filed a motion to suppress the evidence seized during the November 2, 1977 raid. At a hearing on April 20, 1978, Petitioner testified that his consent to Trooper Shaw being on the premises was the direct result of the trooper's failure to properly identify himself and his misrepresentation regarding his purpose in wishing to view the barn. The trial court ruled that the evidence was inadmissible based, inter alia, upon the

involuntary nature of the Petitioner's consent. The Superior Court disagreed and held that the intrusion was with consent and was not an unreasonable invasion of Petitioner's fourth amendment right of privacy.
(See Opinion of J. Price, A-2, Petitioner's Appendix).

SUMMARY OF ARGUMENT:

There is no need for the United States Supreme Court to grant a Petition for Writ of Certiorari because the state appellate court's decision:

(1) is not in conflict with another state court of last resort or of a federal court of appeals; or

(2) does not decide an important question of federal law which has not been decided by the United States Supreme Court; or

(3) has not decided a federal question in a way in conflict with applicable decisions of the Untied States Supreme Court.

Obviously, the propriety of police action can be an important federal question. Under the majority or the concurring opinion below, the particular kind of activity at issue in this case has already been decided by the United States Supreme Court. The majority relies on Schneckloth v. Bustamonte, 412 U.S. 218 (1973); the concurring opinion, on Hoffa v. United States, 385 U.S. 293 (1966), and Lewis v. United States, 385 U.S. 206 (1966).

Further, this decision is not in conflict with the above cited cases. See also U.S. v. Guidry, 534 F.2d 1220 (6 Cir. 1976) and U.S. v. Bullock, 590 F. 2d 117

(5 Cir. 1979), cited in the concurring opinion.

Under Stone v. Powell, 428 U.S. 465 (1976), this claim should not be heard. It is akin to a habeas corpus petition. In Stone, supra, this Honorable Court held that where a state has provided for full and fair litigation of a 4th Amendment claim, a state prisoner may not be granted habeas corpus relief on the ground that evidence obtained unconstitutionally was introduced at his trial.

ARGUMENT

I. UNDER EITHER THE MAJORITY OR THE CONCURRING OPINION OF THE PENNSYLVANIA SUPERIOR COURT, THE DECISION BELOW DOES NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN DECIDED BY THE U.S. SUPREME COURT NOR DOES IT

DECIDE A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

Petitioner claims that the writ should issue because a state court has decided an important question of federal law "which has not been, but should be settled by this court; or, at the very least, (the state court) has decided a federal constitutional question in a way in conflict with the applicable decision of this Court in Lewis." (Petition, p.5, 8).

A six-judge panel of the Superior Court of Pennsylvania[1] reversed the Order of the trial court judge who had suppressed the evidence. Judge Price wrote the

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Footnote:
#1. The intermediate level Appellate Court in Pennsylvania.

opinion of the Superior court. Judge Spaeth wrote a concurring opinion in which Judge Wieand joined. There were no dissents. The Supreme Court of Pennsylvania denied a Petition for Allowance of Appeal. Whether one follows the reasoning of the majority or the concurring opinion, the respondent contends that no writ should issue in this case.

The majority opinion (beginning at Petitioner's text (A-2)) begins its reasoning with Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The court states the Fourth Amendment safeguards against unreasonable governmental intrusions into those areas in which a person displays a reasonable expectation of privacy. Intrusions are allowed only upon execution of a warrant based on probable cause; however, an intrusion is lawful without a

warrant if the suspect consents. The court places great emphasis on the reasoning found in Schneckloth, Supra. The voluntariness of a consent to search is not to be judged by the same standards as the voluntariness aspects of the 5th and 6th Amendment as developed in Miranda v. Arizona, 384 U.S. 436 (1966).

Having made that distinction, the court states the "totality of the circumstances" test. Because no force or coercion is claimed, and because the court finds that the actions of Tpr. Shaw are not inherently coercive, the court does not find that the consent was involuntary (A-6). The majority also does not believe that the technique employed was so egregious as to be contrary to public policy. Dunaway v. New York, ____ U.S. ____, 60 L. Ed. 2d 824 (1979).

Judge Spaeth, in concurrence, bases his position on Hoffa v. United States, 385 U.S. 293 (1966), and Lewis v. United States, 385 U.S. 206 (1966)

In those cases, the 4th Amendment was not violated. He contrasts those opinions with Gouled v. United States, 255 U.S. 298 (1921) where the 4th Amendment was violated. Judge Spaeth asks: Is Petitioner's situation "different enough (his emphasis) from the situation in Lewis and Hoffa to require a different result..." (A-14)?

Judge Spaeth concludes that the lower federal courts have helped to answer that question. Citing United States v. Guidry, 534 F.2d 1220 (6 Cir. 1976) and United States v. Bullock, 590 F.2d 117 (5th Cir. 1979), Judge Spaeth writes:

> "Nevertheless, it is clear, in my opinion, that the Guidry -

> Bullock extension of Lewis and Hoffa does encompass the present case. While this case differs from Guidry and Bullock to the extent that in each of those cases the defendant specifically directed (his emphasis) the agent's attention... The difference is inconsequential. When appellee opened the shutters, the marijuana was in plain view..." (A-17).

Judge Spaeth concludes that the case at bar "presents a use of police deception not at all novel (emphasis added), and within the decided cases." (A-20).

Thus, both the majority and the concurring opinion find this case to be a federal question clearly within the holding of Schneckloth, supra, or the Lewis-Hoffa line of cases. The majority finds no conflict with other applicable decisions of this Court, or other federal courts, e.g. U.S. v. Griffin, 530 F.2d 739 (7 Cir. 1976); U.S. v. Raines, 536 F.2d 796 (8th Cir.), cert. denied, 429 U.S. 925 (1976). The concurring opinion finds no conflict and, as stated above, cites Guidry and Bullock.

II. STONE V. POWELL, 428 U.S. 465 (1976), PRECLUDES REVIEW OF THIS ISSUE.

This Petition for Writ of Certiorari should really be considered as a petition in the nature of a habeas corpus petition. The Superior Court of Pennsylvania voted in favor of the Commonwealth without dissent. The Supreme Court of Pennsylvania denied the application for review without opinion. Full review has been provided by the State court system. In Stone v. Powell, 428 U.S. 465, this court held that where a state has provided for full and fair litigation of a 4th Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was

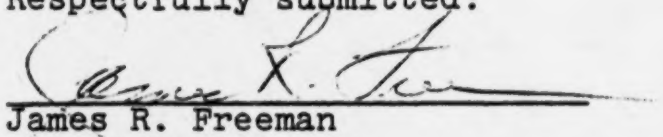
introduced at his trial.

Mr. Morrison is not a prisoner; however, his petition calls for review of an issue which has had a full and fair litigation in the state courts. Those Courts have decided the question within the confines of prior Supreme Court decisions.

CONCLUSION:

For these reasons, a Writ of Certiorari should not issue to review the Judgment and Opinion of the Supreme and Superior Courts of Pennsylvania.

Respectfully submitted:



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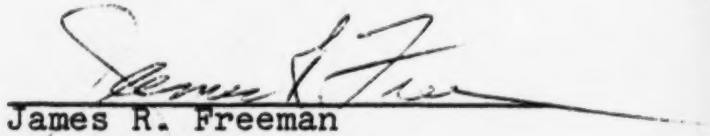
CERTIFICATE OF SERVICE:

I hereby certify that on this 21st day of November, 1980, three copies of the Brief in Opposition to Petition for Writ of Certiorari were mailed by first class mail to Alan Ellis, Esquire, Suite 2200, 1616 Walnut Street, Philadelphia, PA 19103.



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